SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1330.

FRANCIS T. GLYNN,
PETITIONER,

v.

ROBERT H. DONNELLY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of the Respondent Donnelly in Opposition.

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Brief of the Respondent Donnelly in Opposition.

Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit is reported at 485 F. 2d 692 (1973), and is reprinted in the appendix to the petition. The opinion of the United States District Court for the District of Massachusetts is reported at 360 F. Supp. 214 (1973), and is reprinted in the appendix. Not reprinted in the appendix is the opinion of the First Circuit denying bail, 470 F. 2d 95 (1972), and the opinion of the Supreme Judicial Court of Massachusetts reported, *sub nom. Commonwealth* v. *Beneficial Finance Co.*, Mass. Adv. Sh. (1971), 1367, *cert. den. sub nom. Farrell et al.* v. *Massachusetts*, 407 U.S. 910 (1972).

Jurisdiction.

The petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Questions Presented.

1. Should this Court review a construction of the *Uniform Law to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings* which allows a prosecutor to represent only that certain out-of-state witnesses are material and the trial judge to issue certificates of materiality, when such application is made *ex parte?*
2. Should this Court review a matter which both the District Court and the Court of Appeals found frivolous in denying a petition for a certificate of probable cause?
3. Should this Court review a question of law when there has been no conflict in any jurisdiction on the particular question?

Statement of the Case.

This petition asks that a writ of certiorari issue to the United States Court of Appeals for the First Circuit. The question raised arises out of two separate series of indictments and two separate jury trials involving the petitioner.

Beneficial Finance Company (Beneficial), Household Finance Corporation (Household), Liberty Loan Corporation (Liberty), John M. Farrell (a "public relations man" for Beneficial and an officer of one of its subsidiaries), Francis T. Glynn, (a "public relations man" for Beneficial, and an employee of one of its subsidiaries), Nathaniel W. Barber (a "public relations" employee of Household),

James S. Pratt (also a "public relations" employee of Household), Lyle S. Woodcock (an executive vice president of Liberty), Morris Garfinkle (a member of the Massachusetts Small Loans Regulatory Board) and Martin J. Hanley (Deputy Commissioner of Banks and Supervisor of Loan Agencies of the Commonwealth of Massachusetts) were convicted in the first trial. The defendants convicted in the second trial were Local Finance Corporation (Local), Household, Beneficial, Hanley, Farrell, Glynn, Barber, Pratt and Edward R. Newhall (another Beneficial "public relations man," also employed by a Beneficial subsidiary).

In each case the various defendants were charged under indictments returned in 1964 by a special grand jury. The indictments were presented as the result of an investigation developed by the Massachusetts Crime Commission (Commission), a body created by the General Court of the Commonwealth "to investigate and study as a basis for legislative action the existence and extent of organized crime within the commonwealth and corrupt practices in government at state and local levels." Massachusetts Resolves of 1962, c. 146 (1962).

These cases, commonly known as the "small loans" trials, are believed to be the longest and most time consuming in Massachusetts history. Defendants' pretrial motions were heard for 65 court days and span 4,370 transcript pages. The decisions by the trial court on these motions cover about 700 pages. Forty-nine of the indictments were grouped for the first trial, which began on July 18, 1966, and lasted about five months. The defendants took 1,916 exceptions to rulings by the trial court. The transcript of evidence in the first trial consists of 103 volumes containing more than 7,500 pages and the official state court record of pleadings, motions and decisions in the first trial fills 18 bound volumes. The second trial, involving

twenty-one indictments, began on July 17, 1967, and consumed 222 trial days over a period of twelve months. The defendants took 2,431 exceptions to rulings by the trial court. The transcript consists of 223 volumes containing more than 11,800 pages. The official state court record of pleadings, motions and decisions in the second trial fills nineteen bound volumes. The findings, rulings and decisions of the trial judge in all proceedings connected with these cases contain more than 1,400 printed pages. The Supreme Judicial Court devoted two complete hearing days to the oral arguments of these cases and delivered a careful opinion, meticulously covering and disposing of the points raised by petitioner.

From this exhaustive working out of the judicial process, petitioner has culled one point which is discussed below. This contention is collateral to the central evidence at the trials, supported by nothing in the record indicating prejudice.

Reasons For Denying The Writ.

I. THERE WAS NO VIOLATION OF DUE PROCESS IN THE MANNER IN WHICH THE TRIAL COURT CERTIFIED THE APPLICATION FOR ISSUANCE OF PROCESS TO OUT-OF-STATE WITNESSES.

The petitioner contends that the trial court was "induced" by the prosecutor to certify that one Redfield was a necessary and material witness for the Commonwealth in the first state trial (Petition, p. 9).[1]

Although neither Redfield or any other prospective "out-of-state" witnesses actually testified at the trial, the petitioner makes no allegation that the trial judge erred in certifying that their potential testimony would be material. Rather, his sole contention is that the *ex parte* application, in and of itself, so prejudiced him as to deny his Sixth Amendment rights. This issue is raised despite the

fact that the jury never had knowledge either of the prosecutor's representation or the certificate issued by the trial judge.

The petitioner appears at first to contest the finding of guilt on due process grounds. However, as it develops, this is not his challenge. The general verdict of guilty was returned by the jury which had no knowledge of the application for process. The jury also found that no payments were made.

On the basis of the second finding, the petitioner suggests that the trial judge consciously employed the prosecutor's application to increase the severity of Glynn's sentence. The District Court below held:

> "Nothing in aggravation of the offenses of which petitioner stands convicted could reasonably be inferred from the prosecutor's statements to the judge or from the judge's certificates." 360 F. Supp. at 218.

The petitioner's premise is unsound. To accept his argument this Court would have to find that the trial judge, at the time of sentencing, specifically remembered the application, made months before, and elevated it to the status of *evidence* upon which to base a sentence. The contention is untenable and is an insufficient reason to grant certiorari.

II. The Petitioner's Contention does not Rise to a Level of Constitutional Dimension and, hence, the Rule of Chapman v. California, 386 U.S. 18 (1967) is Inappplicable.

The respondent contends that there is no error of constitutional dimension present in the instant case. As stated by the District Court below:

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[1] It should be noted that Redfield was an unindicted co-conspirator. Without reaching the pejorative implication in the term "in-

"Petitioner's argument rests upon a premise which this Court does not accept as valid. Specifically, petitioner assumes, as he must in order to invoke the support of *Chapman* and of *Haller* v. *Robbins*, 409 F. 2d 857 (1st Cir. 1969), that it was constitutional error for the trial judge to pass upon the Commonwealth's requests for out-of-state witnesses under M.G.L. c. 233, § 13A-13D." 360 F. Supp. at 217.

The District Court then described in detail the function of the state prosecutor and the state court under the statute. The District Court specified the application that was made for the process of Redfield, and found that the Redfield certificate issued because there was a *prima facie* showing that the witness was material.

The court then said:

"There is no 'reasonable possibility that the [*ex parte* statements] complained of [or the judge's certificates] might have contributed to the conviction' of petitioner. See *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87, 84 S. Ct. 229, 11 L.Ed. 2d 171 (1963), cited in *Chapman* v. *California*, *supra*, 386 at 23, 87 S.Ct. 824. The verdicts of guilty, therefore, were not tainted by federal constitutional error and the rule in *Chapman* is inapplicable." *Supra*, at 217-218.

The District Court implicitly recognized the principle that, in the review of a state court proceeding, the federal court looks not at whether varying inferences can be drawn from a particular set of circumstances, but whether there is conspicuous and substantial error which results in a constitutionally unfair trial. The District Court found no

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duced," it is readily apparent that one who is named in an indictment as a conspirator would be, almost by definition, a material witness.

such error and denied a certificate of probable cause because it found no merit in the appeal.

The First Circuit deferred to the lower court's characterization of the appeal as "frivolous" and stated with regard to the *ex parte* hearing:

> "To say that such exposure disables that judge *as a matter of constitutional law* from presiding over a subsequent jury trial, because he may consider the *ex parte* representations in imposing sentence, seems to us to expand the policy of insuring the purity of the court to the point of eliminating faith in it." 485 F. 2d at 694. (Emphasis supplied.)

III. The Supreme Judicial Court of Massachusetts did Not Construe the Statute to Apply Only to Jury Trials, Hence, there was No Burden Placed upon Petitioner's Exercise of his Sixth Amendment Rights.

The petitioner urges that the Uniform Law, ". . . as construed by the state court to apply to jury trials only, imposes an unconstitutional burden on his Sixth Amendment right to trial by jury. *United States* v. *Jackson,* 390 U.S. 570." Petition, p. 12.

The respondent respectfully suggests there is no such holding in the opinion of the Supreme Judicial Court. There is no such construction of the statute made at any point in the opinion. The District Court agreed and further noted that even if one assumed the petitioner was correct in his interpretation of what, at best, was dictum, he lacked standing to raise the question because he never considered waiving any rights protected by the Sixth Amendment. 360 F. Supp. at 218.

Without reaching the question of standing, the respondent would note that petitioner has never raised this ques-

tion before the Supreme Judicial Court. The fact that he has raised various other Sixth Amendment claims does not relieve him from compliance with 28 U.S.C. 2254, that "the substance of a federal habeas corpus claim must first be presented to the state courts." *Picard* v. *Connor,* 404 U.S. 270, 278 (1971). To this extent the question is not properly before this Court and certiorari should not be granted on this ground.

IV. There is No Conflict in Any Jurisdiction on the Question Raised by the Petitioner.

The petitioner contends that "[t]hree courts have now made hash of the Uniform Law in attempting to justify . . ." the *ex parte* application and certification. Petition, p. 10. He further contends that the District Court held "in conflict with the decision of the court in *New York* v. *O'Neill* 359 U.S. 1, 3-4." *Id.*

In *New York* v. *O'Neill, supra,* this Court held the Uniform Law constitutional on its face stating that the certificate of the judge of the demanding state shall be "prima facie evidence of all the facts stated therein." 359 U.S. at 3-4.[2] This conflict is apparent only to the petitioner. The respondent sees no conflict, particularly when the District Court below used identical language in denying the writ. 360 F. Supp. at 217.

What the certificate of the trial judge, under the statute and the *O'Neill* rationale, represents is no more than *prima facie* evidence of the truth stated *as to the materiality of the potential witness' testimony.* There is no possible in-

[2] On examination, it is clear from Justice Frankfurter's language that the term "prima facie" evidence was made only in reference to the Florida statute's provision, also contained in Mass. General Laws, c. 233, § 13A. This is acknowledged by the petitioner.

ference that could be drawn from any of the opinions below to indicate that the test relates in any way to evidence admissible in a criminal trial.

Because the cases construing the Uniform Law are consistent, the instant petition does not fall with the Rules of this court, U.S. Sup. Crt. R. 19, 28 U.S.C. App., and certiorari ought not be granted on this ground.

V. A Decision by This Court on This Issue would be Premature Absent Conflicts in Lower Courts and Absent a Case Clearly Involving an Issue of Constitutional Dimensions.

It has long been a policy of this Court not to review cases which present claims of law prematurely made or which in some manner are not "ripe" for determination.[3] These considerations are presently embodied in the Rules of this Court by Rule 19, *supra*, and while the respondent recognizes that certiorari is granted as a matter of sound judicial discretion, he submits the instant case would be particularly inappropriate for review.

The petitioner has been within the judicial process since indictment in 1964. The case, or cases, are probably the longest in the history of the Commonwealth of Massachusetts. The opinion of the Supreme Judicial Court, as noted in the respondent's statement of the case, meticulously covered and disposed of petitioner's claim. On habeas corpus review, both the District Court for Massachusetts and the Court of Appeals for the First Circuit found the petitioner's claim "frivolous." Neither of the lower federal courts found a constitutional claim. In petitioning this Court for certiorari, Glynn has sought review of an

[3] See Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962), for a discussion of the "passive virtues."

issue which has not evolved sufficiently in any jurisdiction to warrant a decision by this Court.

Moreover, the instant petition raises ultimate questions as to finality in the criminal justice system. The questions raised in this petition go not to guilt or innocence but to rational systematic arrangements made in a statute designed for uniform adoption.

The question raised here is, in substance, not one of fairness but, rather, one where this Court is asked to interpret truth and justice in an abstract sense and apply a subjective judgment reached by the petitioner. Our system of law has never required the application of abstract perceptions tending to absolutes. It has required a process to be followed within a rational framework as defined by the Constitution. This the petitioner has received, and certiorari ought not be granted.

Conclusion.

For each of the reasons stated above, the respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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